

**Town of Milford
Zoning Board of Adjustment
November 17, 2011
Case #13-11
Carolyn Magri-Halstead
Special Exception Request for Rehearing**

Present: Kevin Johnson, Chairman
Fletcher Seagroves
Steve Winder

Absent: Steve Bonczar
Laura Horning
Zach Tripp – Alternate
Michael Unsworth – Alternate
Len Harten – Alternate

Secretary: Peg Ouellette

The applicant, Carolyn Magri Halstead, Owner of 365 Melendy Rd and NH Rte 13 South,, Map 52, Lot 18-1, in the Residence "R" District is requesting a rehearing for a special exception from Article VI, Section 6.02.6:B to impact not more than 1,800 SF of wetland buffer for the construction of a proposed driveway.

Minutes of Case #13-11 – Re-hearing request were approved April 05, 2012.

Before considering the requests for re-hearing for this evening, the Chairman read into the record the following information which is summarized from the New Hampshire statutes and handbook published by the NH Office of Energy and Planning, *The Board of Adjustment in New Hampshire*. It is available on the State of New Hampshire web site. The Chairman stated he summarized those portions directly affecting Zoning Boards. The first two sections are from the RSAs (Revised Statutes Annotated), which are the NH Laws and deal with all town governmental boards, whether decisions by the Board of Selectmen, Planning Department, Zoning Department, or any of the other bodies; therefore there is a lot of information within them that is not particularly applicable to the Zoning Board. He read from RSA 677:2: *Within 30 days after any decision of the zoning board of adjustment, the selectmen, any party to the proceeding, or any person directly affected thereby may apply for a rehearing, specifying in the Motion for Rehearing the grounds therefore and the board of adjustment may grant such rehearing if, in its opinion, good reason is stated in the motion.*

He then read from RSA 677:3: *A Motion for Rehearing shall set forth fully every ground upon which it is claimed that the decision is unlawful or unreasonable.*

K. Johnson then said the handbook contains Annotations which describe various court decisions and interpretations which have been given to expand on what is specified under the RSAs, and he read as follows: *A Motion for Rehearing must describe why it is necessary and why the original decision may be unlawful or unreasonable.*

The meeting to consider a Motion for Rehearing is a public meeting and anyone has the right to attend; but all the board is acting upon is the motion in front of them. It is NOT public hearing and no testimony is taken and does not involve comments by the applicant, petitioner, or abutters. If the board believes there are sufficient grounds to reconsider their original decision, the motion should be granted; if not, the motion should be denied.

If the Board decides to grant the rehearing, a new public hearing is scheduled and all legal actions, such as public notice (as required for the first hearing), must be followed. If possible, the same board members from the original hearing should be present at the rehearing. If the board decides not to grant the rehearing, all they must do is inform the petitioner that the rehearing was denied and that the petitioner then has 30 days to challenge the decision by appealing to Superior Court.

A person has a right to apply for a rehearing and the board has the authority to grant it. However, the board is not required to grant the rehearing and should use its judgment in deciding whether justice will be served by so doing. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time.

It is assumed that every case will be decided, originally, only after careful consideration of all evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons. The board, and those in opposition to the appeal, should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them.

K. Johnson then read from the Town Ordinances which give the Board authority for a rehearing, Section 10.04.0: *Rehearings by the Board of Adjustment shall be conducted in accordance with NH RSA 677:2 and:3. Appeals from the Board of Adjustment's decision on a motion for rehearing shall be conducted in accordance with NH RSA 677:4 through :14.*

K. Johnson asked S. Winder if he had had a chance to review the case, as he was not at the original hearing.

S. Winder said he had not.

K. Johnson said that being the case, he would prefer to table this until the next scheduled meeting.

There was discussion as to the date of the next scheduled meeting, in view of the 30-day limit on rehearing, in this case 30 days from November 7. The next scheduled meeting would be December 1.

K. Johnson said that if S. Winder had sufficiently reviewed the material in the previous packet and the current packet and felt he could reach an informed decision, the board could proceed.

S. Winder said he had not reviewed the minutes but had reviewed the packet of information. What he didn't know was what new information may have been presented. He said if the Chairman would like go through that, then he was fine with that.

K. Johnson said he would go through, not necessarily all of it, but would go through the request.

S. Winder agreed.

K. Johnson stated it was not mailed, it was sent as an e-mail with the Fieldstone letter attached.

K. Johnson then moved on to discussion and motion on the request for rehearing. He read the letter from the applicant requesting the rehearing addressed to Kevin Johnson, Chairman, Zoning Board of Adjustment, Town of Milford, 1 Union Square, Milford NH 03055 "RE: Zoning Board of Adjustment Appeal Request: Case #13-11 Special Exception – Article VI, Section 6.02.6:B (Wetland Buffer Impact), Map 52, Lot 18-1 Dear Chairman Johnson, Please consider this letter an official request for a re-hearing to appeal the decision of the Zoning Board of Adjustment on Case #13-11, voted on at its October 6, 2011 Meeting. A re-hearing of this case is warranted based on the following items of concern and new information that was not presented at the October 6th meeting: 1) A review of the minutes of the October 6, 2011 meeting indicates that the seven (7) items in Section 6.02.7 Criteria for Evaluation, which were required for me to address for the Special Exception were not entered into the minutes as provided with my application, nor was I given the opportunity to present these criteria for the official record prior to the hearing being closed to my presentation and public comment. 2) Additional conceptual grading plans will be presented quantifying the proposed environmental impact and soil disturbance which will result if I am required to construct a new driveway access from the frontage on Melendy Road rather than maintain use of the existing access road from NH Rte 13 South. 3) Evaluation of the existing drainage patterns and watershed of the proposed wetland buffer disturbance area to show the negligible potential for increased flooding resulting from the driveway upgrade in the wetland buffer zone. 4) Presentation of a wildlife habitat evaluation of the project area to quantify potential impacts to flora and fauna within the proposed buffer zone impact area.

In addition to the new information outlined above, I have asked that a representative of Fieldstone Land Consultants be available to present the technical information and documentation that supports the Special Exception application; for wetland buffer disturbance associated with bringing the existing access road from NH Rte 13 into compliance with the Town of Milford driveway regulations. With the new information available I respectfully request the Zoning Board grant my request for a re-hearing. Thank you. Carolyn Magri-Halstead"

K. Johnson stated that also attached was a document from Fieldstone Land Consultants, which he did not read but said it was available for review in the Town office. He stated basically it went over the five points for a special exception and the seven points for wetlands impact.

Kevin asked for discussion from the Board.

F. Seagroves said that regarding Item #1 stated by the applicant, he believed the applicant had the opportunity to present all this information; the Board did not stop her from presenting any information. He is glad she has come forth with this information and would have someone come in and explain it to the Board.

S. Winder said he was present at the original case awhile back when the applicant first came in and she had every opportunity to present these facts and findings at that point. Now that she has, he felt she had a basis for re-hearing.

K. Johnson disagreed. He said addressing her point that she was not given the opportunity to present the criteria, the standard procedure of the Board is to ask the applicant to present their case at which

point they have the ability to present any and all information they want the Board to have, the set of answers she provided was part of her application, a copy of which she did not bring to the second meeting and therefore did not read into the record, but it is still part of the record in her application. Also the Board did question her on each of the seven criteria. Therefore he didn't feel that her first request meets any of the necessary criteria. Secondly, he has a couple of problems with the report provided from Fieldstone Consultants. First, it is undated, other than the date the Town received it, so the Board did not know if it was prepared before or after her application; there is nothing in the report to indicate that it could not have been prepared before her initial application and therefore, in his mind, falls into penalizing the Board and the opposing abutters, with the applicant not being fully prepared – which was addressed in the applicable statutes. Also, in reviewing the twelve criteria presented by Fieldstone, there are some addressed as though she is looking for additional access to her property from a homeowner standpoint, and some they address as though she wants to subdivide the property into a separate access for that property. The entire report is not directed solely to providing new access to new property. The report discusses the fact that she is already using the road and this would make it easier for her to use the road. In reality she does not want to continue to use that road; she wants to subdivide the property and have someone else use that road. He didn't see that the report meets the criteria that this information was not available to the applicant to present to the Board prior to her first hearing.

F. Seagroves agreed.

S. Winder said K. Johnson made very good points and he had said she deserved another hearing, but said that in context of not considering the point that she was supposed to have that information available ahead of time. So he agreed with K. Johnson in that regard.

K. Johnson asked for any other comments or questions from the Board. There were none.

K. Johnson called for a motion to approve or reject the request for rehearing.

F. Seagroves made motion to have a rehearing.

K. Johnson said, before seconding, he would vote against it and the motion would fail. Whichever motion they make must be unanimous, so the board would be unable to make a decision this evening.

F. Seagroves agreed.

K. Johnson stated the Board would need to table the motion until the December 1, 2011 meeting and asked for a motion to table the request.

F. Seagroves made a motion to table.

S. Winder seconded.

All voted in favor. The motion to table the request for rehearing for Case #13-11 was unanimously passed.